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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	)	CC Docket No. 96-187

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COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ON PETITIONS FOR RECONSIDERATION

The Competitive Telecommunications Association ("CompTel") provides the following comments on the three petitions for reconsideration of the Commission's *Report and Order* in the above-captioned matter.[1] CompTel opposes SWBT's request that the Commission preclude all Section 208 complaints against streamlined LEC tariffs, and supports the requests of AT&T and MCI that the Commission reverse its interpretation of "deemed lawful" in the statute. CompTel also agrees with AT&T that parties must have at least two business days in which to file petitions against streamlined LEC tariffs, and agrees with MCI that Section 204(a)(3) applies only to local exchange and exchange access services, not to interexchange or other telecommunications services that may be offered by an entity that also is a LEC.

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List A B C D E

[1] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, FCC 97-23 (rel. Jan. 31, 1997) (*Report and Order*). Petitions for reconsideration of the *Report and Order* were filed by AT&T Corp., MCI Telecommunications Corp. and Southwestern Bell Telephone Company. *See 62 Federal Register 14430 (March 26, 1997).*

I. The "Deemed Lawful" Standard Does Not Alter the Effect Of Tariffs That Become Effective Without Suspension and Investigation

The Report and Order concludes that when a LEC tariff subject to streamlining is "deemed lawful" it is conclusively presumed to be reasonable.[2] As a result, although the tariff may later be found to be unlawful pursuant to a formal complaint or the Commission's own investigation, LECs will not be liable for damages for any period during which the unlawful tariff is in effect.[3]

CompTel agrees with AT&T and MCI that the Commission should reconsider this interpretation of "deemed lawful" in Section 204(a)(3). Without any legislative history indicating such sweeping Congressional intent, the Commission grants a status to tariffs filed by LECs greater than the FCC has ever extended to any other type of tariff filings. Throughout the FCC's history, mere Commission inaction in response to a tariff has never been held to be an affirmative finding of lawfulness.[4] Even under the Commission's rules for tariffs filed by non-dominant interexchange carriers, tariffs were "considered *prima facie* lawful," but carriers remained liable for damages if a rate or charge was subsequently found to be unreasonable.[5] Indeed, one of the Commission's rationales for detariffing domestic,

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[2] *Report and Order*, ¶ 19.

[3] *Id.* at ¶ 20.

[4] See *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 730 (9th Cir. 1981) ("the Commission is not required under law to pass any judgment on a proposed tariff, and it does not necessarily approve as agency policy the content of every tariff permitted to go into effect"); *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040; *Associated Press v. FCC*, 448 F.2d 1095 (D.C. Cir. 1971).

[5] 47 C.F.R. § 1.773; *see Tariff Filing Requirements for Nondominant Common Carriers*, 8 FCC Rcd 6752 (1993) (noting that "remedial action can be taken after the tariffs become effective," including through the complaint process), *vacated in other part, Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (DC Cir. 1995).

non-dominant interexchange carrier services was its desire to eliminate the status conferred by the filed rate doctrine and permit state law actions to be brought against such tariffs.[6] In the *Report and Order*, however, the Commission casts aside these remedies, precluding the recovery of damages for tariffs filed by carriers that unquestionably possess market power today and for the foreseeable future.

There is no legal, logical or policy rationale for such a conclusion. The Commission's construction of new Section 204(a)(3) goes far beyond a reasonable reading of the language of the statute or Congressional intent. Section 204(a)(3) greatly accelerates the effective dates for LEC tariff filings and apparently precludes application of the 120-day notice requirement of Section 203(b)(2) to those tariffs. This alone is a major shift in established Commission practices dealing with LEC tariffs. There is nothing in the language or legislative history that suggests Congress also intended to reverse decades of basic tariff law concerning the legal effect of Commission inaction.

As the NPRM readily noted, the phrase "deem lawful" is susceptible of at least two readings.[7] The record showed a number of instances where a statute's use of the word "deem" establishes nothing more than a rebuttable presumption.[8] Indeed, "deem" may be used to connote either a formal judgment or decree or the much less immutable evaluation in

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[6] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report and Order, FCC 96-424, ¶ 55 (rel. October 31, 1996). The Commission made clear its view that upon detariffing, traditional state law remedies would apply to carrier rates and practices. *Id.* at ¶ 38.

[7] *NPRM*, ¶ 10.

[8] *See* AT&T Petition at 6 & n.16 (citing cases).

the sense of to "consider."[9] CompTel believes that Congress intended to confer upon streamlined LEC tariffs a status no greater than that which the FCC had conferred upon non-dominant interexchange carrier tariffs, which are "*considered* prima facie lawful" upon filing.[10] Read in this way, the statute furthers Congress's "pro-competitive, deregulatory" goals by significantly reducing the notice periods for tariffs for local exchange and exchange access services and establishing a rebuttable presumption of lawfulness upon them. These actions significantly reduce the burdens of tariffing while retaining the consumer and competitive protection of tariff review.

The Commission's denial of damages in successful post-effective tariff challenges would represent a major setback to consumers' rights. Knowing that no refunds could be ordered and that review times are minimal, LECs would have new-found incentives and opportunities to file tariffs with questionable rates or terms and conditions. It is patently unreasonable to reward a LEC filing such tariffs by allowing it to keep any inflated or unlawful charges prior to the date upon which the Commission finds the tariff to be unreasonable. Yet that is precisely the outcome resulting from the Commission's reading of "deemed lawful."

Moreover, the Commission has armed LECs with a powerful new sword to attack those who challenge a rate or practice after it goes into effect. Any question as to whether the LECs will use this new weapon is answered by SWBT's petition for reconsideration asking the Commission to deny consumers the right to file any complaints under Section 208 against streamlined LEC tariffs that are "deemed lawful." According to

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[9] *See, e.g.*, American Heritage Dictionary, Second Ed. (defining "deem" as "to judge, consider").

[10] 47 C.F.R. § 1.773(a)(1)(ii).

SWBT, the *Report and Order* ensures that a complainant could *never* meet its burden of proving a rate unreasonable.[11] Congress did not repeal Section 208, however, and the Commission lacks legal authority to preclude the filing of complaints under Section 208, even for tariffs "deemed lawful." Appellate courts have construed Section 208 to permit "complaints about compliance with [tariffs in effect], *as well as their validity*, . . . even though the complaint involves a part of a tariff that the Commission has already approved."[12] Accordingly, the "deemed lawful" standard cannot deprive complainants of their rights under Section 208 to challenge a tariff filed under Section 204(a)(3).

SWBT's petition instead provides further illustration of the error in the *Report and Order's* interpretation of "deemed lawful." The Commission cannot and should not, by inaction, preclude aggrieved customers from bringing valid claims that a LEC's rates or practices are unreasonable. The possibility that the *Report and Order* may have this effect strongly suggests that there is something wrong with the Commission's interpretation of the significance of a tariff that is "deemed lawful." While Congress might have wanted to see LEC tariffs go into effect without delay, no goal (except the self-interest of the LECs) is served by closing the door forever on challenges to a LEC's tariffs.

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[11] SWBT Petition at 2.

[12] *Richman Bros. Records, Inc. v. U.S. Sprint Communications Company*, 953 F.3d 1431, 1435-36 (3d Cir.), *cert. denied*, 505 U.S. 1230 (1991) (emphasis added).

II. The Commission Should Allow At Least Two Business Days for Parties to File Oppositions To LEC Tariff Filings

The *Report and Order* provides only three calendar days for parties to file oppositions to a LEC tariff filed pursuant to Section 204(a)(3).[13] This time period is extremely tight and will create significant difficulties in tracking, evaluating, and opposing LEC tariff filings. As AT&T points out in its petition, the Commission's rule virtually assures that LECs will file tariffs just before the close of business on Fridays, leaving parties only one business day to obtain, review, and, if necessary, respond to the tariff filing.[14] Such a short time period denies parties a meaningful opportunity to review a LEC's proposed tariff. Accordingly, CompTel agrees with AT&T that the Commission should amend its rules to provide that the three day period for filing oppositions must include at least two business days.

III. The Commission Should Clarify That Section 204(a)(3) Applies only to Tariffs Filed by LECs For Exchange and Exchange Access Services

MCI asks in its petition that the Commission clarify that the tariff streamlining provisions of Section 204(a)(3) apply only to LEC tariffs to the extent the filing relates to local exchange or exchange access services.[15] The Commission should make this clarification to its *Report and Order.*

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[13] *Report and Order* ¶ 78.

[14] AT&T Petition at 11.

[15] MCI Petition at 19-20.

Section 204(a)(3) applies to tariffs filed by a "local exchange carrier." Under the Act, a "local exchange carrier" is defined as a person that provides telephone exchange service or exchange access.[16] Section 204(a)(3) should be read, therefore, to apply only to tariffs filed by a LEC in its capacity as a LEC. There is nothing in the section or the Act which suggests LECs can invoke Section 204(a)(3) for other non-exchange services they offer. Indeed, it would be anomalous if a LEC could gain the benefit of the Commission's interpretation of "deemed lawful" for its interexchange services while the interexchange services of other carriers are not given the same effect, simply because the LEC also provided local exchange and exchange access services. Whatever procedural and substantive significance Section 204(a)(3) has for LEC tariff filings, those provisions should apply only to local exchange or exchange access services offered by the LEC.

Conclusion

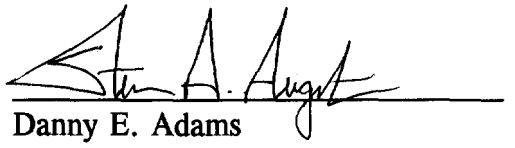
For all the foregoing reasons, the Commission should grant the petitions for reconsideration of AT&T and MCI and modify its interpretation of Section 204(a)(3)'s "deemed lawful" provision. Customers should not be precluded from receiving damages for LEC tariffs later found to be unreasonable. The Commission also should ensure that parties will have at least two business days to oppose a tariff filed under Section 204(a)(3) and

[16] 47 U.S.C. § 153(26).

should clarify that the streamlined procedures may only be used for local exchange or exchange access services offered by the LEC.

Respectfully submitted,

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

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April 10, 1997

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ON PETITIONS FOR RECONSIDERATION to be delivered on this 10th day of April, 1997 by first class mail, postage prepaid, on the following persons:

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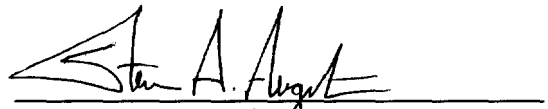

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